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## **JURISDICTIONAL STATEMENT**

This appeal involves a final circuit court judgment pertaining to the relocation of a parent with her minor child pursuant to §452.377 R.S.Mo. (2000) (hereinafter the “Relocation Statute”). The minor child, and both parents are residents of the state of Missouri, and the relocation occurs under the authority of a Missouri statute. Petitioner asserts that the trial court lacked subject-matter jurisdiction when it improperly prohibited the relocation; hence the judgments of the trial court are void and must be dismissed.

On March 13, 2002, the St. Louis County Circuit Court entered its Findings of Fact, Conclusions of Law and Family Court Judgment/Decree of Modification of Dissolution of Marriage (hereinafter the March 13, 2002, Judgment”) wherein it denied Petitioner’s request to relocate the residence of the parties’ minor child. Said Judgment became final on May 23, 2002. On February 6, 2003, Petitioner filed a Motion to Set Aside the trial court’s judgment denying her request to relocate pursuant to M.R.C.P. Rule 74.06(b)(4). In her motion, Petitioner argued that the trial court lacked subject-matter jurisdiction to enter the March 13, 2002, Judgment because Respondent failed to file his objections to the proposed relocation within the thirty-day deadline set forth in the Relocation Statute. Thereafter, the trial court entered its Judgement (sic) on March 26, 2003 (hereinafter the “March 26, 2003, Judgment”), wherein it denied Petitioner’s motion to set aside the March 13, 2002, Judgment.

The Eastern District Court of Appeals affirmed the trial court’s judgments on December 23, 2003, and on February 26, 2004, it denied Petitioner’s Motion for Rehearing or in the Alternative for Transfer to the Missouri Supreme Court. This Court

granted Petitioner's Application for Transfer on March 30, 2004, Accordingly, jurisdiction is proper in this Court pursuant to Article V, Section 3 of the Constitution of the state of Missouri

## **STATEMENT OF FACTS**

Petitioner/Appellant, Andrea Dietrich (hereinafter referred to as “Petitioner” or “Appellant”) and Respondent Steve Tomey’s (hereinafter referred to as “Respondent”) marriage was dissolved on or about May 31, 1996. There was one child born of the marriage. Said minor child will be identified herein as the “Minor Child.” Petitioner and Respondent were awarded joint legal custody of the Minor Child and Petitioner was awarded primary physical custody. [LF 29, 30]

Petitioner was married to Joseph Dietrich (hereinafter “Petitioner’s Husband”) on July 4, 2001. Shortly before they were married, Petitioner’s Husband’s employer closed its St. Louis office. [Tr.1<sup>1</sup> p.210-218] Petitioner’s Husband is a licensed electrical engineer and a state licensed electrical contractor in Nevada [Tr.1 p.207, ln.2], but he is not licensed in Missouri, therefore Petitioner’s Husband testified that he was unable to find employment or long-term contract work in Missouri. [Tr.1 p.210-218] After his efforts to find employment in St. Louis failed, Petitioner’s Husband moved to Nevada where he lived prior to his assignment in St. Louis. [LF 49, 50] [Tr.1 p.274, p.10] Petitioner’s Husband formerly resided in Nevada and maintained and owned a home there. [Tr.1 p.205, ln.9 and p.219, ln.10]

As early as October 2000, Petitioner and Respondent discussed a proposed relocation, but the parties did not reach a formal agreement in that regard. [Tr.1 p.26,

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<sup>1</sup> Tr.1 refers to the transcript of the trial on January 30, 2002, wherein the trial court heard evidence on Respondent’s Objections.

ln.24; p.246, ln. 5 and p.288, ln.12] After several months of discussion failed to produce a formal agreement, Petitioner sent notice pursuant to Section 452.377(2) R.S.Mo. (2000) (hereinafter the “Relocation Statute”) to Respondent at his place of employment which stated that Petitioner intended to relocate with the Minor Child to reside with her husband in Nevada on or about June 15, 2001 (hereinafter the “Notice”). [LF, 7, 30 ¶4, 77¶1, 94, 95], [Tr.1 p.219, ln.21,] and [Tr.2<sup>2</sup> p.8, ln.22; p.13, ln.22; p.20, ln.6; p.31, ln.5; p.53, ln.5; p.54, ln.22 and p.56, ln.14] See also Appendix A-1, A-6, A-8 and A-9.

Petitioner’s Notice dated March 23, 2001, was sent via certified mail return-receipt requested on March 27, 2001, and complied with all statutory notice provisions of Section 452.377(2) R.S.Mo. (2000). [Tr.1 p.244, ln.21] and [Tr.2 p.13, ln.1 and p.31, ln.5] See also Appendix A-1, A-6 and A-8.

When Respondent had not mentioned the letter in conversations subsequent to Petitioner sending Notice [Tr.2 p.58, ln.12], Petitioner mailed a copy of the Notice to Respondent’s residence on April 16, 2001, (hereinafter referred to as the “Copy of the Notice”). [Tr.2 p.31, ln.5] The Copy of the Notice was also sent via certified mail, return-receipt requested, and Respondent received the Copy of the Notice and signed the return-receipt on April 17, 2001. See Appendix A-8.

After thirty (30) days elapsed from the time Respondent received Petitioner’s Notice and no formal or informal objection had been made, Petitioner informed the

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<sup>2</sup> Tr.2 refers to the transcript of the hearing on March 19, 2003, wherein the trial court heard testimony and arguments on the issue of Petitioner’s Motion to Set Aside.

Minor Child that they would be moving, and she and the Minor Child began making arrangements to move to Nevada. [Tr.2 p.27, ln.3 and p.20, ln.16] Petitioner hired a real estate agent, and quit her job to make improvements to her home to prepare it for market. [Tr.2 p.21, ln.3 and p.201, ln.20] Petitioner and the Minor Child made trips to their new residence in Nevada [Tr.2 p.27, ln.3]. The Petitioner and her husband introduced the Minor Child to other children in the neighborhood [Tr.1 p.280, ln.1], researched the school system and extracurricular activities for the Minor Child similar to those in St. Louis in which he participated. [Tr.1 p.53, ln.1; p.220, ln.3; p.254, ln.10, 23 and p.279, ln.24] and [Tr.2 p.27, ln.5] The Minor Child and Petitioner traveled to California where the child completed and passed an entrance examination into the Challenger School [Tr.1 p.255, ln.1 and p.317, ln.8], a private school with a branch school close to their new home in Nevada [Id. at ln.18]. On May 2, 2001, Petitioner paid the Challenger School a pre-enrollment fee for the attendance of the Minor Child. [Tr.1 p.254, ln.25]

On May 3, 2001, Respondent filed his Objections to Petitioner's Proposed Relocation of Child (hereinafter "Objections"). [LF 7] In his verified Objections Respondent stated that he received the Notice on March 23, 2001. [LF 7]

Two months later, on June 4, 2001, Respondent filed his verified Petition for Temporary Restraining Order and/or Preliminary Injunction (hereinafter the "Petition for TRO"). [LF 11-16] In the Petition for TRO Respondent claimed he received notice on April 17, 2001. Id. On that same day, the trial court granted Respondent's request for Temporary Restraining Order which precluded, enjoined and restrained Petitioner from relocating the Minor Child to Nevada (hereinafter the "TRO"). [LF 17-18] On June 4,

2001, eleven (11) days prior to her scheduled move Petitioner was served with the TRO. [Tr.1 p.246, ln.20] [Tr.2 p.34, ln.22] The receipt of the Restraining Order was the first time Petitioner was made aware that Respondent had any objections to the relocation. Id.

At the end of the summer, 2001, Petitioner's home sold and she and the Minor Child moved into an apartment temporarily pending the outcome of the litigation. [Tr.1 p.247, ln.11, 24]

On January 30, 2002, the parties offered evidence on the merits of Respondent's Objections. At trial, the Guardian ad Litem reported that she favored the relocation opining that it was in the best interest of the Minor Child. [Tr.1 p.350, ln.1] Copies of the certified mail receipts and return cards for both the Notice and the Copy of the Notice were entered into evidence at the January 30, 2002, trial as Petitioner's Exhibit 4. [Tr.1 p.244, ln.21] See Appendix A-8.

On March 13, 2002, the trial court entered its Findings of Fact, Conclusions of Law, and Family Court Judgment/Decree of Modification of Dissolution of Marriage (hereinafter the "March 13, 2002, Judgment") wherein it found that notice was sent on or about March 23, 2001. The court further found that the Respondent's Objections were filed on May 3, 2001, yet the court ruled in favor of Respondent and prohibited Appellant from relocating. [LF 29-39] After denying Petitioner and the Guardian ad Litem's motions for a new trial, the trial court's judgment subsequently became final on May 23, 2002. [LF 41]

On February 6, 2003, Petitioner filed her Motion to Set Aside the March 13, 2002, Judgment (hereinafter the "Motion to Set Aside"). [LF 42-72] The Motion to Set Aside

is the subject of this appeal. At the hearing on March 19, 2003, on Petitioner's Motion to Set Aside Petitioner testified that she mailed the Notice to Respondent dated March 23, 2001, via certified mail, return-receipt requested. [Tr. 2 p.8, ln.22; p.13, ln.11 and p.31, ln.5] The documentary evidence shows that the Notice was mailed on March 27, 2001. [Appendix A-8] In his responsive pleadings and at the March 19, 2003, hearing Respondent admitted seven times that he did in fact receive the March 23, 2001, Notice. [LF 7¶3] and [Tr.2 p.53, ln.5; p.54, ln.22; p.55, ln.21; p.56, ln.14; p.57, ln.21 and p.58, ln.3] In his verified Objections, Respondent stated he received the Notice on March 23, 2001. In Respondent's pleadings and in his testimony in open court, he admitted having received the Notice prior to the end of March, 2001. [LF 7¶3, 30 ¶4], and [Tr.2 p.53, ln.5; p.54, ln.22; p.55, ln.21; p.56, ln.14; p.57, ln.21 and p.58, ln.3] see also Appendix A-1. Twice, Respondent admitted under oath that he failed to respond to the Notice within thirty (30) days of receiving it. [Tr.2 p.55, ln.21 and p.56, ln.14] Respondent offered no documentary or testimonial evidence at either the trial or the hearing on the Motion to Set Aside to rebut any of Petitioner's testimony or the documentary evidence which supported the fact that Petitioner sent the Notice via certified mail, return-receipt requested on March 27, 2001. At no time did Respondent challenge Petitioner's evidence that the Notice was in fact delivered to and received by Respondent prior to the end of March.

On March 26, 2003, the trial court denied Petitioner's Motion to Set Aside. [LF 95] As grounds for its denial of Petitioner's Motion the trial court found that Petitioner did not present evidence of delivery of the Notice; and concluded that the evidence

showed the Respondent did receive the Copy of the Notice on April 17, 2001. [LF 94] In its reasoning for refusing to set aside the March 13, 2002, judgment the trial court stated that only the Copy of the Notice sent April 16, 2001, met the technical requirements of the Relocation Statute and concluded that Respondent had filed his Objections within thirty (30) days of receiving the Copy of the Notice. [LF 94]

Petitioner appealed the March 26, 2003, judgment denying her motion to set aside the initial judgment to the Missouri Court of Appeals for the Eastern District on May 1, 2003. On December 23, 2003, the Eastern District affirmed the trial court's March 26, 2003, Judgment by *per curiam* order with an attached private memorandum. [Appendix A-28] Petitioner's Motion for Rehearing or in the Alternative for Transfer to the Missouri Supreme Court was denied on February 26, 2004 [Appendix A-32]. On March 10, 2004, Petitioner filed her Application for Transfer in this Court, which was sustained on March 30, 2004.

## **POINTS RELIED UPON**

- I. The trial court erred in finding that Appellant's Notice of the proposed relocation with the parties' minor child was defective because Respondent failed to personally sign the return-receipt and further concluded that the evidence did not show that Respondent received the Notice, in that said finding is against the weight of the evidence because Appellant presented uncontroverted evidence at both hearings that conclusively proved that Appellant complied with all notice provisions of Section 452.377 R.S.Mo. (2000), that Respondent received the Notice of the proposed relocation, that he failed to file his Objections within Thirty (30) days thereafter, and that Respondent admitted to the same in his verified pleadings and under oath at both the trial and the hearing on Petitioner's Motion to Set Aside.**

Bremen Bank and Trust Company of St. Louis v. Muskopf,

817 S.W.2d 602 (Mo. App. E.D. 1991)

Baxley v. Jarred,

91 S.W.3d 192 (Mo.App.W.D. 2002)

Section 452.377 R.S.Mo. (2000)

- II. The trial court erred in denying Appellant's motion to set aside the trial court's judgment prohibiting relocation of the primary residence of the Minor Child in that the trial court's judgment erroneously declares and applies the provisions of Section 452.377 R.S.Mo. (2000), and Missouri legal precedent because Appellant sent notice of the proposed relocation in**

**compliance with Section 452.377 R.S.Mo. (2000), and Respondent failed to timely file objections; therefore, the trial court was without subject-matter jurisdiction and the resulting court's judgment prohibiting relocation is void as a matter of law.**

Baxley v. Jarred,

91 S.W.3d 192 (Mo.App.W.D. 2002)

Heslop v. Sanderson,

123 S.W.3d 214 (Mo.App.W.D. 2003)

Herigon v. Herigon,

131 S.W.3d 562 (Mo.App.W.D. 2003)

Wright v. Wright,

WD 62155 (Mo.App. 2004)

Section 452.377 R.S.Mo. (2000)

M.R.C.P. Rule 44.01(b)

M.R.C.P. 74.06(b)(4)

## ARGUMENT

### STANDARD OF REVIEW

The standard of review for court-tried cases involving custody matters is set forth in Murphy v. Carron, 536 S.W.2d 30 (Mo.banc 1976). “The decree or judgment of the trial court will be sustained by the appellate court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law.” Id. at 32. The judgment of the trial court should be affirmed by the higher courts if it is supported by substantial evidence, is not against the weight of the evidence, and does not erroneously declare or apply the law. In re Marriage of Eikermann, 48 S.W.3d 605, 608 (Mo.App.S.D. 2001). Where the law has been erroneously applied or the evidence is uncontroverted, no deference is due the trial court's judgment. Bremen Bank and Trust Company of St. Louis v. Muskopf, 817 S.W.2d 602, 604 (Mo. App. E.D. 1991), *citing* Southgate Bank and Trust Co. v. May, 696 S.W.2d 515, 519 (Mo.App.W.D. 1985).

- I. The trial court erred in finding that Appellant’s Notice of the proposed relocation with the parties’ minor child was defective because Respondent failed to personally sign the return-receipt and further concluded that the evidence did not show that Respondent received the Notice, in that said finding is against the weight of the evidence because Appellant presented uncontroverted evidence at both hearings that conclusively proved that Appellant complied with all notice provisions of Section 452.377 R.S.Mo. (2000), that Respondent received the Notice of the proposed relocation, that**

**he failed to file his Objections within Thirty (30) days thereafter, and that Respondent admitted to the same in his verified pleadings and under oath at both the trial and the hearing on Petitioner's Motion to Set Aside.**

In its March 26, 2003, Judgment, the trial court found that there was insufficient evidence to support that Respondent received the Notice, but that there was evidence that the Copy of the Notice was received by Respondent. The trial court therefore concluded that Respondent was first notified on April 17, 2001, thus his Objections filed May 3, 2001, were timely filed. [LF 95] [See also Appendix A-26] In making this finding the trial court ignored uncontroverted evidence of receipt of the Notice prior to the end of March 2001. In its judgment the trial court specifically cited to Petitioner's Exhibit 4 [Appendix A-8] which it indicated supported receipt of the Copy of the Notice. In fact, Petitioner's Exhibit 4 is a copy of the certified mail receipts and return-receipts for both the Notice and the Copy of the Notice. The two sets of receipts differ only in the dates and the fact that the Copy of the Notice was personally signed by the Respondent. The trial court apparently concluded that the Notice did not meet the delivery requirements of 452.377 R.S.Mo. (2000) (referred to herein as the "Relocation Statute") because Respondent failed to personally sign the return-receipt. This conclusion of the trial court also ignores Respondent's testimony that he did in fact receive the Notice before the end of March 2001, and that Respondent's testimony corroborated the date stamp on the return receipt which shows delivery on March 29, 2001. [Tr.2 p.53, ln.5; p.54, ln.22; p.55, ln.21; p.56, ln.14; p.57, ln.21 and p.58, ln.3 [Tr.2 p.55, ln.21 and p.56, ln.14]

Where the law has been erroneously applied or the evidence is uncontroverted this Court need not defer to the trial court's judgment. See Bremen Bank and Trust Company of St. Louis v. Muskopf, 817 S.W.2d 602, 604 (Mo. App. E.D. 1991). In the case before this Court Petitioner offered clear, convincing and uncontroverted evidence that she sent the Notice in compliance with the Relocation Statute. In fact, Respondent's testimony and the documentary evidence supported those facts. The trial court's finding of fact that Respondent did not receive the Notice is clearly erroneous and should be ignored by this Court.

The Relocation Statute provides that notice of a "proposed relocation of the residence of a child, or any party entitled to custody or visitation of child, shall be sent in writing by certified mail, return-receipt requested, to any party with custody or visitation rights." Section 452.377(2) R.S.Mo. (2000) Absent exigent circumstances as determined by a court with jurisdiction, written notice must be delivered at least sixty (60) days in advance of the proposed relocation. Id. Section 452.377(7) R.S.Mo. (2000), provides that "the residence of the child may be relocated sixty (60) days after providing notice, as required by this section, unless a parent files a motion seeking an order to prevent the relocation within thirty (30) days after receipt of such notice." The evidence is clear that Respondent failed to file his Objections within Thirty (30) days following receipt of the Notice.

At the hearing on Petitioner's Motion to Set Aside Petitioner again testified as to having sent the Notice via certified mail, return-receipt requested prior to the end of March, 2001. [Tr.2 p.13, ln.5] At the same hearing Respondent admitted to receiving the

Notice in March, 2001 [Tr.2 p.53, ln.5; p.54, ln.22; p.55, ln.21; p.56, ln.14; p.57, ln.21 and p.58, ln.3], and he admitted twice to failing to respond to the Notice within thirty (30) days of his receiving it. [Tr.2 p.55, ln.21 and p.56, ln.14] The Respondent offered no evidence or testimony whatsoever to contradict the testimony and documentary evidence which conclusively proved that the Notice was sent via certified mail, return-receipt requested and that the Notice was in fact received by Respondent and complied with the delivery and content requirements of the Relocation Statute.

In the March 26, 2003, Judgment on Petitioner's Motion to Set Aside, the trial court reversed its initial finding of fact by stating that the March 23, 2001, Notice had not met the delivery requirements of the Relocation Statute in that Respondent failed to personally sign the return-receipt. [LF 87] The trial court's reversal of fact in this matter was contrary to the uncontroverted testimonial and documentary evidence. Both parties agree that the return-receipt from the Notice was not personally signed by Respondent and that the signature is illegible; however, Respondent admitted under oath to receiving the Notice before the end of March 2001, as well as to his failure to file his Objections within thirty (30) days thereafter.

Absolutely no evidence or even an unsupported denial was offered to refute the clear evidence that Petitioner sent the Notice via certified mail, return-receipt requested, that Respondent had received it and failed to file his objections within thirty (30) days after receiving it.

As the result of the trial court's decision Petitioner, her husband and the minor child have been living under stressed circumstances. After the trial court's judgment prohibited her from relocating to Nevada, Petitioner purchased an inexpensive condominium as much of the proceeds from the sale of her home were used for attorneys' fees and expensive temporary housing and her income had been reduced. [Tr.2 p.28, ln.3 and Tr.2 p.21, ln.6] Petitioner and her husband continue to maintain two households and are incurring substantial travel expenses as they are forced to live in different states. [LF 16] [Tr.2 p.19, ln.11, 18 and p.24, ln.5]

The trial court's reversal of its initial finding of fact was against the overwhelming weight of uncontroverted evidence. The trial court therefore erred in its March 26, 2003, Judgment when it held that the Notice was not properly received per the requirements of the Relocation Statute. Had the trial court found that Notice was properly delivered and received and that Respondent failed to file his objections within thirty (30) days following receipt of the Notice, the trial court would have been without subject-matter jurisdiction to consider Respondent's objections and Petitioner would have had an absolute right to relocate with the parties' minor child. Baxley v. Jarred, 91 S.W.3d 192, 205 (Mo.App.W.D. 2002).

**II. The trial court erred in denying Appellant's motion to set aside the trial court's judgment prohibiting relocation of the primary residence of the Minor Child in that the trial court's judgment erroneously declares and applies the provisions of Section 452.377 R.S.Mo. (2000), and Missouri legal**

**precedent because Appellant sent notice of the proposed relocation in compliance with Section 452.377 R.S.Mo. (2000), and Respondent failed to timely file objections; therefore, the trial court was without subject-matter jurisdiction and the resulting court's judgment prohibiting relocation is void as a matter of law.**

This Court may consider setting aside the trial court's judgment where the trial court erroneously declares or applies the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo.banc 1976); and In re Marriage of Eikermann, 48 S.W.3d 605, 608 (Mo.App.S.D. 2001). In the case before this Court, the trial court did in fact misstate and misapply the law to the facts of this case.

A. Actual Notice Complies with the Notice Requirements of Section 452.377(2) R.S.Mo. (2000).

The evidence clearly shows that Petitioner satisfied all of the statutory notice requirements of the Relocation Statute. In addition to notice sent in compliance with the Relocation Statute, Respondent had actual notice which is legally sufficient to satisfy the statutory requirements.

As support for denying Petitioner's Motion to Set Aside, the trial court stated "The statute does not provide for any presumption of receipt based upon the mailing or accept regular mail notice or even actual notice as sufficient." [LF 94] This statement erroneously declares and fails to correctly apply established Missouri case law.

It is well settled Missouri law that where the party entitled to receive statutory notice actually receives the notice, technical compliance with the notice provisions of the

statute is not necessary. See Gateway Frontier v. Selner, etc., P.C., 974 S.W.2d 566, 571 (Mo.App.E.D. 1988); Weaver v. Kelling, 53 S.W.3d 610, 616 (Mo.App.W.D. 2001); Crawford v. Crawford, 986 S.W.2d 525, 528 (Mo.App.W.D. 1999) and Macon-Atlanta State Bank v. Gall, 666 S.W.2d 934, 940 (Mo.App.W.D. 1984).

The issue of the sufficiency of actual notice was specifically addressed in a recent Western District Court of Appeals case involving the effect the respondent's failure to timely file objections under the Relocation Statute. See Baxley v. Jarred, 91 S.W.3d 192, 205 (Mo.App.W.D. 2002). Unlike in the present case, in Baxley no evidence was offered that notice under the Relocation Statute was sent via certified mail. In fact, in Baxley, petitioner admittedly sent the notice via regular mail; however, since the respondent had actual notice the court held the lack of technical compliance regarding delivery of the notice to be "of no consequence." Id.

In two cases which followed Baxley, the Western District clarified its application of actual notice to the Relocation Statute. In Herigon v. Herigon 131 S.W.3d 562 (Mo.App.W.D. 2003) and again in Wright v. Wright, WD 62155 (Mo.App. 2004), the Western District held that for actual notice to satisfy the notice requirements of the Relocation Statute the notice must contain all of the information required by the Relocation Statute, but that technical compliance with the delivery of the notice is not relevant where the nonrelocating party has actual notice. Herigon at 566 and Wright<sup>3</sup>. In

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<sup>3</sup> This case has not yet been assigned a reporter number; therefore page numbers are not available.

Herigon and Wright, the facts were distinguishable from Baxley in that the relocating parties failed to provide all the necessary statutory information to the nonrelocating parties; therefore, the Western District found that the actual notice alleged in those cases were insufficient to satisfy the requirements of the Relocation Statute.

In contrast to the facts in Wright and Herigon, the mothers in Baxley and in the present case did in fact send written notice which contained all of the information required by the Relocation Statute, the lack of delivery by certified mail, return-receipt requested in Baxley, and only the lack of Respondent's signature on the return-receipt in the present case were determined by the respective trial courts to have been defective under the Relocation Statute. In Baxley, the Western District held that technical compliance with the delivery requirements was not necessary where there was actual notice. Baxley at 205. In the present case Petitioner did comply with the notice requirements of the Relocation Statute and Respondent had actual notice of the relocation.

1. ***Respondent's signature on the return-receipt from the Notice is not required by the Relocation Statute***

In the case at hand, the Notice and proposed parenting plan did include all of the information required by the Relocation Statute and was in fact sent via certified mail, return-receipt requested. The trial court found the Notice defective because the return-receipt was not personally signed by the Respondent. [LF 94] The Court of Appeals for the Eastern District also held that the Notice was defective and did not comply with the Relocation Statute simply because the Respondent failed to personally sign the return-

receipt. [Appendix A-31]

The Relocation Statute does not require personal service of the notice on the nonrelocating party, nor does it require restricted delivery. The United States Postal Service return-receipt form includes a box by which a sender may choose “restricted delivery.” See Appendix A-8. Restricted delivery requires the letter to be delivered only to the addressee and the return-receipt must be personally signed only by the addressee. Although that service is available, the Relocation Statute does not require it. In adding the requirement that the recipient must personally sign the return-receipt, the trial court and the Eastern District are, in one breath creating a new statutory requirement, but due to the private manner in which the Eastern District’s opinion was issued it limited this burden only to the Petitioner in this particular case.

The Relocation Statute requires only one form of delivery of the notice, *i.e.* certified mail, return-receipt requested. To create an additional requirement of the nonrelocating party’s personal signature would allow nonrelocating parties to delay proceedings indefinitely by simply refusing to sign for the letter. This is clearly a result not anticipated nor desired by our state legislature.

**2. *“Reasonable Confusion” is not a legitimate defense for failure to meet a statutory deadline.***

The Eastern District also held that the Notice was defective because Petitioner sent a copy of the Notice to Respondent a few weeks after sending the original Notice. [Appendix A-31] The Eastern District held that it was reasonable for Respondent to be “confused” by receiving the Copy of the Notice; therefore he was not required to respond

within thirty (30) days following receipt of the Notice, rather the Eastern District held that Respondent's Objections, filed within Thirty (30) days after receipt of the Copy of the Notice was sufficient to give the trial court jurisdiction to consider the Objections. Id.

Petitioner testified that she sent a copy of the Notice because she had not heard from the Respondent with regard to the relocation after sending the Notice, and she wanted to make sure Respondent actually received and read the Notice. [Tr.2 p.58, ln.12] By sending a copy of the Notice, Petitioner went beyond the letter of the Relocation Statute to make sure the Respondent was sufficiently notified. Neither the Respondent nor the Eastern District cited any legal authority which would support "reasonable confusion" as a legitimate defense to Respondent's failure to file objections within the statutory deadline. Holding that Petitioner's decision to send a copy of the Notice could have caused the Respondent to become "confused," the Eastern District has punished Petitioner for her extraordinary compliance and rewarded the Respondent for ignoring the Notice until a copy was sent to him. "Reasonable confusion" as to statutes of limitations and other statutorily prescribed deadlines is not a defense for untimely filing, and there exists no legal authority to expand the deadline in this or any other case involving a clear statutory deadline.

The trial court misstated and misapplied the law by holding that actual notice was not sufficient to begin the thirty-day time period set forth in the Relocation Statute, in that established Missouri law clearly provides that where actual notice exists technical compliance with the relevant statute is not required.

B. Respondent Failed to File His Objections to the Proposed Relocation Within the Thirty-Day Time Period Required by § 452.377(7) R.S.Mo. (2000), Therefore the Trial Court was Without the Requisite Subject-Matter Jurisdiction to Consider the Objections.

*1. Failure to file objections within the statutory period set forth in the Relocation Statute deprives the trial court of subject-matter jurisdiction.*

In the case before this Court the trial court was presented with the Objections of Respondent, filed May 3, 2001, wherein, he admitted receiving the Notice on March 23, 2001<sup>4</sup>. The averments that Respondent received the Notice before the end of March 2001, which were contained in Respondent's Objections alone is self-proving that Respondent failed to timely file his Objections. The trial court therefore lacked subject-matter jurisdiction to hear Respondent's Objections. The trial court also did not have jurisdiction to consider Respondent's Petition for TRO precluding the Petitioner from relocating.

In the present case, the record is clear that Petitioner, acting in good faith provided the required notice in writing and delivered it to the Respondent via certified mail, return-receipt requested. [LF, 7, 30¶4, 77¶1, 94, 95], [Tr.1 p.219, ln.21,] and [Tr.2 p.8, ln.22; p.13, ln.22; p.20, ln.6; p.31, ln.5; p.53, ln.5; p.54, ln.22 and p.56, ln.14] See also

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<sup>4</sup> See footnote 3 above wherein the facts ultimately showed that the Notice was mailed on March 27, 2001, and was received on March 29, 2001.

Appendix A-1, A-6 and A-8. The Notice properly contained the information required by the Relocation Statute. See Appendix A-8. By his own admission, Respondent received the Notice before the end of March, 2001. [LF 94] [Tr.2 p.53, ln.5; p.54, ln.22; p.55, ln.21; p.56, ln.14; p.57, ln.21 and p.58, ln.3] Respondent further testified twice to his failure to respond to the Notice within thirty (30) days after receiving the Notice before the end of March 2001. [Tr.2 p.55, ln.21 and p.56, ln.14]

Section 452.377(7) R.S.Mo. (2000), provides that “the residence of the child may be relocated sixty (60) days after providing notice, as required by this section, unless a parent files a motion seeking an order to prevent the relocation within thirty (30) days after receipt of such notice.” The statute provides no exception to the thirty-day deadline.

It is well settled that, where a court operates under authority of a statutory provision and a statutory deadline has expired, the trial court no longer has jurisdiction over the subject matter. Randles v. Schaffner, 485 S.W.2d 1, 3 (Mo. 1972) Beach v. Director of Revenue, 934 S.W.2d 315, 317 (Mo.App.W.D. 1996).

Baxley v. Jarred, 91 S.W.3d 192 (Mo.App.W.D. 2002), is instructive with regard to the interpretation of provisions of the Relocation Statute. In Baxley, as in this case the mother provided written notice of her intention to relocate with the parties’ minor child. The father failed to file his objections within the thirty-day deadline expressed by the Relocation Statute. As in the present case, the trial court in Baxley entered a judgment enjoining and restraining the mother from relocating with the parties’ minor child; however, the mother had already relocated with the minor child sixty (60) days after notice was received. The Western District Court of Appeals found the trial court to be

without subject-matter jurisdiction to enjoin the mother from relocating because the father failed to file his verified objections to the proposed relocation within the thirty-day statutory deadline. In both Baxley and the case at hand, the custodial parents complied with and followed the proper procedures set forth in the Relocation Statute, but the non-custodial parents did not.

In Heslop v. Sanderson, 123 S.W.3d 214 (Mo.App.W.D. 2003), the Western District once again addressed a case where the respondent failed to timely file his verified objections. In Heslop, the parties were in litigation regarding the respondent's motion to modify when the petitioner provided respondent with her notice of intent to relocate with the parties' minor child. Respondent filed a motion to amend his motion to modify to include his objections to the relocation. The motion to amend was filed and granted within thirty (30) days after the notice of intent to relocate; however, the actual amended motion to modify which included respondent's objections was not filed until thirty-five (35) days after receiving the notice of intent to relocate. The Western District held that although the respondent was free to merge the two matters, the relocation issue had its own statutory timetable which "could not be enlarged by the trial court pursuant to [M.R.C.P.] Rule 44.01(b)." Id. at 220. By this ruling, and its decision in Baxley, the Western District interprets the thirty-day time period in which a nonrelocating party may file objections much like a statute of limitations whereby the failure to initiate proceedings within the time set forth in the statute leaves the trial court without jurisdiction to consider the objections.

**2.     *The Relocation Statute Provides for Court-Ordered and Non-Court-Ordered Relocations.***

The Baxley court reasoned that unlike the prior version of the Relocation Statute, which permitted non-court-ordered relocation only where the non-relocating parent expressly consented to relocation in writing, the revised Relocation Statute permits non-court-ordered relocation in cases of both expressed and implied consent. The court further recognized that where the non-relocating parent fails to file a timely objection to notice, consent is implied thus removing jurisdiction from the trial court to hear untimely filed objections. Baxley, at 199. In the case before this Court, Respondent admittedly failed to file his objections to the proposed relocation within the thirty-day deadline. Respondent's objections were untimely filed, resulting in statutorily implied consent.

In its analysis of the Relocation Statute the Baxley court acknowledged that the state legislature thought the previous statute to be ineffective by causing relocation issues to be unduly burdensome, delayed and costly. Id. The prior statute provided for two occasions in which the primary residence of a child could be relocated: (1) upon the expressed written consent of the non-relocating party; or (2) upon an order of the court, if the non-relocating parent refused to expressly consent in writing. Id.

The Missouri legislature rewrote the statute in 1998, to allow for non-court-ordered relocation based upon implied consent as well as expressed consent. Baxley, at 198. According to the Baxley court, in enacting the new version of the statute the legislature intentionally drafted a more detailed procedure for addressing relocations which would insure that relocating parents would not be left in limbo, streamline the

process and treat both parents consistently, equally, and fairly, while still protecting the best interests of the child. Baxley, at 199.

In rewriting the Relocation Statute the legislature recognized that the mass of relocation cases and the delays due to lengthy litigation was harmful to all parties involved. It therefore endeavored to craft a statute which would allow nonrelocating parties a mechanism by which to contest a relocation without the ability to delay the decision indefinitely. The legislature's efforts were thwarted in the case before this Court because the Petitioner, her husband and the Minor Child were unnecessarily delayed and harmed by Respondent's untimely filing of his Objections. When Respondent failed to file objections in court within the thirty-day deadline Petitioner rightfully assumed that she could rely on the clear language of the Relocation Statute because Respondent's inaction logically resulted in implied consent to the relocation. As Respondent failed to object to the relocation, either officially by filing verified objections, or informally by communicating his opposition by any means, Petitioner informed the Minor Child of the relocation. [Tr.2 p.27, ln.5] She quit her job to make repairs and improvements to her home, placed her home on the market with a real estate agent and packed their belongings. [Tr.2 p.20, ln.18] At great expense, Petitioner made arrangements to move and made several trips to Nevada with the Minor Child to acclimate the Minor Child to his new home and community. [Tr.1 p.53, ln.1; p.220, ln.3; p.254, ln.10, 23 and p.279, ln.24] and [Tr.2 p.27, ln.5]

Thirty (30) days is more than enough time for a concerned parent to file objections to a proposed relocation. Filing after the deadline can only indicate less than serious

intentions on the part of the non-relocating party, and a desire to disrupt and delay the relocation. In this case, Respondent continued to make every effort to delay and disrupt the proceedings and to hide the issue of his late filing from the trial court. In fact, after he filed his Objections, Petitioner was not notified or provided with a copy of the Objections until June 4, 2001, which were attached to the TRO. [Tr.1 p.246, ln.20] [Tr.2 p.34, ln.22] Knowing Respondent had not complied with the statute by failing to timely file his Objections within the thirty-day deadline, the Respondent filed a Petition for TRO which alleged he received notice on April 17, 2001, rather than in March as was stated in his verified Objections. Respondent's Petition for TRO was not filed simultaneously with his Objections; rather he waited over two months, just before the Petitioner's moving date to file his Petition for TRO and notify Petitioner of his Objections to the proposed relocation causing more harm to Petitioner and the Minor Child. [LF 11-16] [Tr.1 p.246, ln.20] [Tr.2 p.34, ln.22] Thereafter, Respondent failed to appear at all four scheduled settlement conferences, and Respondent's counsel further requested, and was granted four continuances which delayed the hearing nearly eight months [Tr.1 p.302, ln.3], and left Petitioner and the Minor Child living in temporary housing until the matter was finally heard nearly a year after sending the Notice. [Tr.1 p.300, ln.19]

Respondent's failure to file timely objections was deemed consent to the proposed relocation under the Relocation Statute; therefore, Petitioner had an absolute right to rely on that implied consent in making her plans to relocate. The trial court's acceptance of the Respondent's untimely filed Objections prejudiced the Petitioner by creating an unnecessary and substantial financial and emotional hardship on Petitioner and her

husband. [Tr.2 p.24, ln.5 and p.28, ln.4] Most important, the improper ruling adversely affected the Minor Child by creating confusion and the perception of instability, and by undermining the Petitioner's attempt to make the relocation as smooth as possible for the Minor Child. These hardships were precisely the problems the legislature intended to avoid in reconstructing the Relocation Statute.

**3.     *No exceptions exist to the thirty-day deadline for filing objections to relocations pursuant to the Relocation Statute.***

In the present case, the trial court's decision to hear and rule on Respondent's untimely filed Objections was contrary to the letter and the purpose of the Relocation Statute. The Relocation Statute provides no exception to the thirty-day period whereby the noticed parent might file objections to allow the court to regain subject-matter jurisdiction, nor does the trial court have the discretion to ignore expressed statutory deadlines.

Where legislative intent is clear by reading the language of the statute, as is the case with the Relocation Statute, the courts are without authority to read into the statute a contrary intent. See Pavlica v. Director of Revenue, 71 S.W.3d 186, 189 (Mo.App.W.D. 2002). In drafting the Relocation Statute, the legislature intentionally and expressly provided an exception to the sixty-day time-frame for the relocating party. “**Absent exigent circumstances** as determined by a court with jurisdiction, written notice shall be provided at least sixty days in advance for the proposed relocation.” [emphasis added] Section 452.377(2) R.S.Mo. (2000) In contrast, by not expressly making an exception the legislature did not intend to allow for any exception to the thirty-day time deadline in

which the non-relocating party has to file his objections. The thirty-day deadline which applies to the non-relocating parent is therefore absolute and without exception.

In Heslop v. Sanderson, 123 S.W.3d 214 (Mo.App.WD 2003) the Western District relied upon M.R.C.P. Rule 44.01(b) in holding that the trial court does not have the discretion to expand that deadline in the Relocation Statute for filing objections to proposed relocations. Rule 44.01(b) specifically states that a trial court is without the authority to expand a deadline for initiating proceedings.

If the courts allow exceptions to statutory deadlines where none is expressly stated then all other expressed statutory deadlines are also meaningless. In this case, the trial court therefore failed to recognize the clear and absolute statutory deadline; hence, it failed to apply the statute which was the legislature's clearly expressed policy of treating the Petitioner and Respondent consistently, equally, or fairly.

Unlike in Baxley, in this case, knowing his Objections were beyond the thirty-day statutory deadline the Respondent filed a Petition for a Temporary Restraining Order relying on the date he received the Copy of the Notice. Lacking subject-matter jurisdiction to hear the Petition for TRO, the trial court should not have taken any action other than to exercise its inherent power to dismiss Respondent's Objections and the Petition for TRO. Baxley, at 206, and Evans v. Director of Revenue, 871 S.W.2d 90, 92 (Mo. App.E.D. 1994).

***4. Pursuant to Section 452.377(10), in non court-ordered relocations the trial court does have jurisdiction to make a determination as to the amount and type of contact the respondent will have with the minor child and the allocation of travel expenses.***

The Baxley court noted that the Relocation Statute provides a two-part process. Baxley, at 201. Once a relocation is authorized either by the court-ordered or non-court-ordered process, the Relocation Statute requires the trial court to make certain determinations regarding the relocation. Section 452.377(10) R.S.Mo. (2000). Subsection ten (10) of the Relocation Statute provides that in either case of an authorized relocation (*i.e.* court-ordered or non-court-ordered), the trial court must “(1) order such contact with the non-relocating parent as needed to assure that the child has frequent, continuing and meaningful contact with the non-relocating parent; and (2) specify how the added transportation costs caused by the relocation are to be allocated between the parties and adjust the child support, as appropriate, to reflect such allocation.” Baxley, at 201. See also 452.377(10) R.S.Mo. (2000).

Respondent’s failure to file his Objections within the statutory deadline resulted in implied consent to the relocation, thus leaving the trial court without subject-matter jurisdiction to approve or disapprove the relocation. The only issues over which the trial court had jurisdiction to rule were those pursuant to Subsection Ten (10) of the Relocation Statute pertaining to contact with the non-relocating party and allocation of the travel expenses. The trial court therefore had no authority to entertain Respondent’s Objections to Petitioner’s relocation nor to restrain and enjoin Petitioner from relocating

with the Minor Child. It therefore erred in issuing judgments as to the relocation and in failing to enter a ruling pursuant to subsection ten (10) of the Relocation Statute which pertains to the only issues over which the trial court had jurisdiction.

C. Pursuant to M.R.C.P. Rule 74.06(B)(4), Final Judgments Must be Set Aside if They are Void.

The Baxley court found that when the father failed to file his objections in accordance with §452.377(7) R.S.Mo. (2000) the mother had an absolute right to relocate with the child without the expressed consent of the respondent or a court order. Baxley, at 204. Furthermore, the Baxley court stated that the respondent's objections to the petitioner's proposed relocation were, as a matter of law untimely and not properly before the trial court, therefore the trial court's order prohibiting the petitioner from relocating with the parties' child was void *ab initio*, which required reversal of the court's judgment enjoining the petitioner's relocation. Baxley, at 206.

M.R.C.P. 74.06 (b)(4) provides that a court may relieve a party from a final judgment or order if the judgment is void. A court may declare a judgment void under Rule 74.06(b) when court which issued the judgment either lacked jurisdiction over the subject-matter or the parties, or if the court acted in a manner inconsistent with due process. Platt vs. Platt, 815 S.W. 2d 82, 83 (Mo.App.E.D. 1991).

Judgments that lack subject-matter jurisdiction are void at their inception. Williams v. Williams, 932 S.W.2d 904, 905 (Mo.App.E.D. 1996) *citing* K & K Investments v. McCoy, 875 S.W.2d 593, 596 (Mo.App.E.D. 1994). "Any action taken by

a court lacking subject matter jurisdiction is null and void." Ferguson v. Director of Revenue, 783 S.W.2d 132, 133 (Mo.App.E.D. 1989).

It is well settled that judgments, as are those in the present case are void where the court has no subject-matter jurisdiction. Not even a confession of judgment can confer subject-matter jurisdiction where it does not exist. Feldmann v. McNeill, 772 S.W.2d 409, 410 (Mo.App.E.D. 1989). In fact, a court lacking subject-matter jurisdiction can take no action other than to exercise its inherent power to dismiss. See Evans v. Director of Revenue, 871 S.W.2d 90, 92 (Mo. App.E.D. 1994).

In the case before this Court, the trial court lacked subject-matter jurisdiction to rule on Respondent's Objections and Petition for Restraining Order. As a result, those judgments are void from their inception as a matter of law and must be set aside.

## **CONCLUSION**

The trial court improperly ruled against the overwhelming weight of uncontroverted evidence when it found that Notice was insufficient because the evidence did not indicate when Respondent received it. The trial court further erred in its application of the law when it failed to recognize actual notice sufficient to comply with the mailing provisions of the Relocation Statute.

The Petitioner complied with the provisions of the Relocation Statute in providing to Respondent properly delivered statutory notice. Respondent failed to file his Objections within the thirty-day deadline; therefore he implicitly consented to the relocation. As a result, the trial court lacked subject-matter jurisdiction to rule on Respondent's Objections. The initial judgment on the Respondent's Objections, the temporary restraining order and the judgment denying Petitioner's Motion to Set Aside entered by the trial court are therefore void *ab initio*, and must be set aside.

Petitioner therefore prays this Honorable Court to reverse the trial court's judgment denying Petitioner's Motion to Set Aside the void judgments of the trial court. Petitioner also requests a specific finding allowing Petitioner and the Minor Child to relocate to Nevada to be reunited with Petitioner's Husband.

Petitioner further prays this Court to remand with direction to the trial court to determine the only two issues over which it has authority to rule: 1) the amount and type of contact the Minor Child should have with Respondent sufficient to assure the child has frequent, continuing and meaningful contact with Respondent; and 2) the allocation of travel expenses between the parties.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

WITH MISSOURI SUPREME COURT RULE 84.06

COMES NOW, Appellant, by and through her attorneys of record and certify the following concerning the Appellant's Substitute Brief filed herein:

1. The Appellant's Substitute Brief was prepared using Microsoft Word, version 2003, computer software.
2. The font used is Times New Roman, size 13.
3. The brief is double spaced, except the signature block, certificates, cover page and documents in the Appendix.
4. The paper size is 8.5 x 11 inches.
5. The paper used weighs not less than nine pounds to the ream.
6. The pages are all one-sided with no type on the back side of any page.
7. The left, right, top and bottom margins are not less than one inch.
8. The pages are numbered consecutively after the cover page. Pages in the Appendix are numbered A-1, A-2, etc.
9. The brief is securely bound on the left.
10. The brief contains 8,726 words, as indicated in the word processing "Properties" function. The word count is exclusive of the cover page and Appendix, but does in fact include this certificate, the Affidavit of Service and signature page.
11. The undersigned, attorney for Appellant, certifies that she has transferred this brief to a double-sided, high density, IBM-PC compatible 1.44 MB, 3 ½" floppy

disk, to which an adhesive label identifying the caption of the case, and the party filing the disk and the number of the disk (*e.g.* 1 of 2) is attached to the disk.

12. One such floppy disk is being filed with the brief. A second floppy has been mailed to Respondent attorney along with one printed copy of the brief.

13. Both disks have been scanned for viruses using Norton Antivirus software which was updated with the latest virus definitions just prior to the scan.

Respectfully submitted,

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### CERTIFICATE OF SERVICE

Jennifer K. Suits, being of lawful age, being first duly sworn upon oath stated that she caused one printed copy and a copy in Microsoft Word format on floppy disk of the foregoing Appellant's Substitute Brief and one printed copy of the Appendix to Appellant's Substitute Brief in Appeal Number SC85879 to be delivered, postage prepaid via first-class mail to Ms. Susan Hais, Attorney for Respondent, 100 S. Brentwood Blvd., Suite 400, Clayton, Missouri 63105.

Dated this 19<sup>th</sup> day of April, 2004.

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